United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2056

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To be argued by
Melvin Bressler

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2056

UNITED STATES ex rel. ALTON CANNON,

Appellee,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Appellant.

Appeal from the United States District
Court for the Western District of New York

APPELLANT'S BRIEF

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Preliminary Statement

This is an appeal from a decision and order of the District Court for the Western District of New York, John T. Curtin, Judge, dated February 20, 1975, which granted appellee's petition for a writ of habeas corpus, and ordered him released from state custody unless he were retried within 30 days.

Questions Presented

1. Did the presented at the further Wade hearing raise any question concerning taint of the lineup so that the state court decision could be superceded by the district court?

2. Was it error for the Judge below to impose the presumption that available witnesses not called would have testified unfavorably to respondant?

3. Were the conclusions reached below supported by the evidence adduced in light of the prior state court rulings in this case, and the limitations of this Court's remand opinion?

4. Did the petitioner below sustain his burden of proof considering the original Wade hearing in the state court and the testimony developed at the further hearing on remand?

Prior Proceedings

Appelle, Alton Cannon, was convicted of forcible rape in the Monroe County Court, and sentenced to six and two thirds to 20 years imprisonment.

After exhausting his state remedys, he sought relief in federal habeas corpus. His initial applications were denied, and on appeal, this Court remanded for a further Wade hearing (486 F. 2d 263, at 268).

On remand, the district court decided, after a hearing, that petitioner (appellee) was entitled to be released or retried.

Statement of Facts

Appellee Cannon was convicted in Monroe County, New York, or rape, first degree (McKinney's Penal Law, §130.35) and sentenced to imprisonment for from six and two thirds to 20 years.

Part of the evidence against him at trial was his oral admission, and the in-court identification of the victim.

Prior to trial, Cannon had been picked out in a lineup by the victim. There was a Wade hearing to test the validity of the lineup and the ability of the victim to make an untainted in-court identification. The trial court allowed the victim make the identification at trial after finding the lineup free from taint. There was a later hearing on the question of Cannon's right to counsel at the lineup, after which the conviction was affirmed. Ultimately, Cannon exhausted all his state remedies without success.

In her initial complaint, the victim told the police her attacker wore a green shirt. Later, when Cannon first came to the attention of the police, he was also wearing a green shirt. When Cannon was brought to the lineup, from his hotel room, the officer told him to put the green shirt on.

The officer conducting the lineup, Detective Mahoney, testified that others in the lineup were of approximately the same height and build of Cannon, and that one or two were similarly dressed. He was not asked and did not specify if anyone other than Cannon had on a green shirt. The answer to that question was the reason for the Court's ordering an evidentiary hearing. Judge Feinberg put it this way (486 F. 2d at 267) :

" *** As noted previously, however the

> Wade hearing did not elicit any comparative evidence on the colors worn by the other men at the lineup. If all were dressed in green the inference of undue suggestion would clearly fail. If one or two had on green shirts, the inference would weaken very considerably. *** "

On remand, Detective Mahoney was the only witness to testify. He said unequivocally that one of the others in the lineup had on a shirt " *** similar, in fact, almost identical to the one Alton Cannon wore ***. " (Appendix, pg. A-24).

After the hearing, Judge Curtin held the lineup tainted and ordered Cannon released or retried within 30 days. No objection was raised to Cannon's release pending our appeal.

Point One

The Pre-Trial Lineup
Was Properly Held And
Did Not "Taint" The
Identification By The Victim

It was never seriously contended that Mrs. Rippel could identify her attacker based only on her observations at the time of attack. She got a glimpse of a male negro the same build and height and wearing the same color and style shirt as the person she had just seen following her.

Considering the times we live in, for good or ill, it is obvious that any young woman walking alone in a relatively deserted part of town would notice a male following her for over half a mile. Therefore the fact that she could identify the man following her is not unusual. The jury question was whether that was the same man that attacked her. There was enough to raise a jury question, and no question as to the sufficiency of the evidence is before this Court.

Therefore, when considering whether there was "taint" in the lineup we have to consider what independant basis Mrs. Rippel had for remembering the man following her. Was she identifying the man, or the green shirt.

Her testimony was clear, consistant on all material points and unshaken on cross examination. (Her trial testimony is set out in appendix pages A-68 to A-98). Clearly she had sufficient independant basis for her identification.

However, since there was a lineup, the possibility of mis-identification required the hearing below.

That hearing was not a de novo hearing, but a continuation of the State Wade hearing, obviously to determine what the other subjects in the lineup were wearing. Indeed, in its opinion, this Court offered the District Court the option of holding the further hearing or allowing the State to do so (486 F. 2d at 268).

Once the testimony was in, we think the District Court Judge should have given more weight to the earlier State hearings in determining credibility. We respectfully point out that both the trial Judge and the trial jury must

have believed the testimony by Mahoney or there would have been no conviction. We have set out Mahoney's testimony at both the hearing below and the original Wade hearing (pgs. A-21, A-60). A comparison will show no material inconsistencies. Notwithstanding the thorough cross examination of Cannon's counsel below, and the close questioning of the Judge as well (A-49 - A-51) Mahoney never wavered on the only material point, the presence of another subject wearing a green shirt. Naturally, after six years the memory of certain details become vague. Still, the only fair reading of Mahoney's testimony is that he consciously sought, and found, someone wearing a similar shirt, and put him in the lineup. That being so, the conclusion that there was "taint" is not supportable.

We urge that a fair reading of this Court's opinion remanding for further testimony compels the conclusion that if Mahoney's testimony below had been before the State Court, then this Court would have affirmed the dismissal of the petition.

The order appealed from should be reversed.

Point Two

Appeile Did Not Carry His Burden Of Proof As A Habeus Corpus Petitioner; The District Court Apparently Improperly Shifted The Burden To Respondent Below.

It is elemental that the burden of proof in a habeus corpus petition is on the petitioner.

In this case, this Court felt it could not rule on the petition because the evidence was incomplete. On remand, the additional testimony did not support petitioner. The District Court however found for petitioner based on the testimony it heard. If the trial judge on the original Wade hearing had come to the same conclusion, he would have had two options: disallow any identification testimony, or disallow any testimony about the lineup (see former Code of Criminal Procedure, §393-b: "When identification of a person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification***".

If it were shown that Mrs. Ripple had an independant basis for any identification in court, she may do so. Neil v. Biggers ,

409 U.S. 188, 93 S. Ct. 375, discussed in the remand opinion, 486 F 2d at 267; People v. Ballot, 20 N. Y. 2d 600, discussion at 606, 286 N. Y. S. 2d at 6. Since the trial court allowed the lineup testimony, this other option was not considered in the State court, and apparently not considered by the District Court either.

If this were an appeal from an original hearing, the burden on us to demonstrate that the hearing Judge came to an erroneous conclusion where the testimony was at least partially subject to interpretation would be a large burden indeed. However, this is not an appeal from an original determination. The instructions from the panel that heard the original appeal in this case were specific, and we think, narrowed the normal scope of discretion in the District Court somewhat. The only issue on remand was the clothing worn by the subjects other than Cannon. Once that testimony was received, and was not favorable to petitioner, the Court below should have considered that evidence in light of what the state court previously held. Surely, if the state court heard further testimony of Detective Mahoney, they would have retained the same conclusion -- no taint. For the Federal Court to hold otherwise makes meaningless the last part of

28 U.S.C. §2254 (d) that the state court opinion or findings are presumed correct.

The Judge below found that Mahoney's testimony was "equivocal" (A-9) and that there was a presumption that certain witnesses that were available but not called by the state would have testified unfavorable to the state.

We respectfully suggest that there was nothing equivocal or ambiguous about Mahoney's testimony. The worst that may be said is that after six years, he couldn't remember what material the shirts were made from, and whether they were worn inside or outside the trousers, or whether they were long or short sleeved. He didn't equivocate, he said he didn't remember. He also had trouble remembering which officers were assisting in the lineup procedure. We urge that if his story, after six years, were too pat,that would be more suspect than a normal memory lapse on an immaterial point. Since Mahoney specifically picked one of the other subjects because of the similarity of the shirts, common sense dictates that he would remember that long after he forgot everything about the incident. Further, what he remembered would be that the shirts were, as he testified, " ***similar, in fact, almost identical***." (A-24), rather than the specific color or style of the shirt.

While there is a presumption in certain cases that an uncalled witness would testify unfavorably to that side, that presumption is always one of fact, not law, dependant on the surrounding circumstances. U. S. v. Johnson, 467 F. 2d 804; U. S. v. Llamas, 280 F. 2d 392.

Imposing that presumption under the facts of this case was an improper exercise of discretion.

The only issue was possible taint based on what the other subjects were wearing. All the uncalled witnesses did testify either in the original Wade hearing or at trial. There was no showing that (a) any other witnesses knew or would remember after six years what clothing the other subjects wore, especially when it didn't seem material at the time, and (b) if anyone had information whether they would necessarily testify one way or another, (i.e. tend to favor one side). See U. S. v. Johnson, 467 F. 2d 804, at 809, and authorities cited.

Furthermore, petitioner (by counsel) knew exactly who and where these uncalled witnesses were by their discovery, and by independant methods. See comments of petitioner's attorney, William Gardner at A-41.

Therefore, petitioner could have talked to them to see just what they remembered, or what, if any, bias they might have, and if necessary, called them as his own witness.

This alone should seriously weaken, if not remove, the presumption.

In addition, we do not think that presumption is valid in a preliminary hearing, where guilt is not an issue.

Taken together, the testimony of Detective Mahoney did nothing to change the decision the state court originally came to, and the District Court should be, in great measure, bound by that court's findings, at least to the extent of requiring affirmative evidence on petitioner's side before, in effect, reversing the findings of the state court.

Once the continued Wade hearing was concluded, the findings there added nothing to petitioner's case, and his burden as petitioner was not met. See U. S. ex re. Stanbridge v. Zelker, (second circuit, decided April 15, 1975) slip opinion at page 2915 (dkt. nos. 73-2504, 75-2009).

For all these reasons, the order of the district court should be reversed, and the conviction reinstated.

Conclusion

Taking the evidence adduced at both the original and further Wade hearings, the hearing court did not give sufficient weight to the findings of the state court, and based its conclusions at least in part on a presumption improperly applied. As a result, the petitoner (appellee) did not meet his burden of demonstrating any Constitutional error.

The decision and order below should be reversed and the conviction reinstated.

Respectfully submitted,

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